**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**NEW YORK BRANCH OFFICE**

**UNITED STATES POSTAL SERVICE**

**and** **Case 01-CA-145800**

**NATIONAL ASSOCIATION OF LETTER CARRIERS, BRANCH 92, A/W NATIONAL ASSOCIATION OF LETTER CARRIERS**

*Daniel Fein, c*ounsel for the General Counsel.
*Roderick Eaves, Esq., c*ounsel for the Respondent.

## DECISION

### Statement of the Case

**Joel P. Biblowitz, Administrative Law Judge.** This case was heard by me on October 6, 2015,[1] in Portland, Maine. The complaint herein, which issued on June 30, and was amended at the hearing pursuant to a Notice of Intention to Amend dated September 28, was based upon an unfair labor practice charge as well as first, second, and third amended charges that were filed on June 17, August 13, and September 25 by National Association of Letter Carriers, Branch 92, affiliated with National Association of Letter Carriers (the Union). The complaint, as amended, alleges that by written requests dated January 20 and 22, the Union requested that the United States Postal Service (the Respondent) furnish it with employee and witnesses' statements that formed the basis of placing employee Kimberly Stokes on emergency leave, which information was relevant to the Union in the performance of its duties as the collective-bargaining representative of certain of the Respondent's employees. On about February 12 and 25, the Respondent informed the Union that it would not give the Union this information unless they signed a confidentiality agreement tendered to it on those dates, and the Union replied that it is not required to sign a confidentiality agreement in order to receive the information. It is alleged that by refusing to turn over this information to the Union, absent the execution of a confidentiality agreement, the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

### I. Jurisdiction and Labor Organization Status

The Respondent admits, and I find, that the Board has jurisdiction over it by virtue of Section 1209 of the Postal Reorganization Act (PRA), and that the Union and National Association of Letter Carriers (NALC), have each been labor organizations within the meaning of Section 2(5) of the Act.

### II. The Facts

Since about 1961, the Respondent has recognized NALC as the exclusive collective-bargaining representative of certain of its employees (letter carriers) and this recognition has

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2015.

been embodied in successive collective-bargaining agreements, the most recent of which is effective from January 10, 2013, to May 20, 2016. At all material times, the Union has been a member of NALC and has been designated to act as its agent in certain aspects of bargaining for the Portland, Maine facilities.

This matter began with an allegation by mail handler Jens Harrington that Stokes, a letter carrier, sexually harassed him by touching him in an inappropriate manner. As a result of this allegation, on January 16 Stokes was placed on emergency leave, pursuant to section 16.7 of the Agreement between the parties, pending the investigation of the allegation. On January 20, Bridget Cervizzi, union steward, filed a Request for Information (RFI) with the Respondent requesting the name of the person who initiated the sexual harassment allegation and any and all evidence pertaining to placing Stokes on emergency leave. On January 22 there was a predisciplinary investigation (PDI) with Stokes, Dale Nunn, presently the postmaster in Bangor, Maine, and James Thornton, the postmaster in Portland, Maine. Cervizzi testified that these PDIs are basically the employee's day in court and at the PDI she learned who the accuser was and what the allegations were. In addition, at the PDI, Thornton said that he had statements from witnesses to the incident. At the conclusion of the PDI, Cervizzi filed another RFI requesting Thornton's questions and notes of Stokes taken at the PDI, her answers, and all the evidence pertaining to the investigation of the sexual harassment charge against her, and on January 22, Cervizzi filed a grievance alleging that the Respondent violated section 16.7 of the Agreement by placing Stokes on off-duty nonpay status. Cervizzi met with Supervisor Kristin Bishop at the informal step A level, without agreement, and the grievance was moved to formal step A level. On January 29, the parties agreed to extend the time limits on the formal step A to February 6 because the Union had not received any of the requested information and on January 23 Cervizzi made another RFI request for information about Harrington. She testified that she didn't know him and wanted to see if he had a history of making allegations against other employees. On February 12, Thornton gave Cervizzi a Confidentiality Agreement and told her that she and the other union officers would have to sign it before he would turn over the requested information. The Agreement states that the Respondent believes that the information was protected by the Privacy Act and contains confidential or proprietary information and may be used by the Union only for the proper and lawful performance and execution of its duties as the employees' bargaining representative. It further states that the right of access to this information was limited to certain individuals, whose names were subsequently added, and that these individuals were forbidden from publicly disclosing the information. Cervizzi told him that under article 31 of the Agreement the Union was entitled to this information without any restrictions, and Thornton replied that he would give them the information when they signed the Confidentiality Agreement. Cervizzi did not ask him to modify it in order to make it acceptable to the Union. By letter dated February 25, Thornton wrote to Cervizzi:

> I am writing in response to your request for information (RFI) which was submitted to me on January 22, 2015 and the subject of subsequent National Labor Relations Board Charge # 01-CA-145800, This RFI sought information related to an alleged case of sexual assault / sexual harassment. At that time you were verbally notified that the allegations were the subject of an ongoing Management Investigation and that your request was premature but would be considered at the conclusion of the investigation. On February 12, 2015 the Management investigation was completed and the NALC Branch 92 was provided notice of the completion and provided a confidentiality agreement to sign in order to receive the information. As of today, February 25, 2015 I have not received a signed confidentiality agreement from you.
>
> In that I am charged with properly protecting the rights of both the accused and accuser in this matter and that confidentiality has been requested I am again seeking an

> authorized NALC Branch 92 signature on the attached Confidentiality Agreement prior to releasing the information sought. I am not averse to the NALC possessing this information but am unclear on how the attached agreement impinges upon the NALCs clear right to collectively bargain on behalf of its membership in the grievance process. That being said please clarify in writing specifically how the attached agreement limits your contractual bargaining rights in regards to the case at hand and how the agreement serves to make the documentation you seek less relevant to the grievance forum you are authorized to represent. I make this request regarding clarification and relevancy based upon the mutually agreed upon language detailed in Articles 17 and 31 of your National Agreement.

After receiving this letter, Cervizzi told Thornton that pursuant to the Agreement, the Union was entitled to receive the information without any restrictions. On February 21, Cervizzi filed a grievance alleging that the Respondent violated the Agreement when they refused to provide the Union with the requested information about the Stokes incident and investigation.

Mark Terry, executive vice president of the Union, testified that he attended the formal step A grievance meeting on February 6 relating to Stokes' emergency leave pursuant to section 16.7 of the Agreement. However, the grievance was not resolved at that time because the Union was unable to represent Stokes due to the fact that it had not received the requested information. On February 9, the Respondent sent Terry a Management Formal A Response denying the grievance. The next step is to the joint dispute resolution team, containing one representative from the Respondent and one from the Union. The issue was whether the Respondent had just cause for the emergency placement of Stokes on off-duty nonpay status because of the allegation of sexual harassment, and the dispute resolution team found that they did have just cause for doing so.

Mark Seitz, union president, represented the Union at the formal step A grievance meeting on March 16 that attempted to resolve Cervizzi's February 21 grievance regarding the refusal of the Respondent to provide the Union with the information requested regarding Stokes' emergency leave. Thornton attended for the Respondent, but the matter was not resolved. On the following day, he filed a response to the grievance stating that the Union was offered the information, but refused to agree to a Confidentiality Agreement, stating:

> The information requested by the Union is sensitive and the accuser has requested confidentiality. It is my obligation to protect the accuser. Management has never denied the union from obtaining the information, only requested that all parties that will have access to the information sign a Confidentiality Agreement.

The Union appealed the failure to resolve the dispute to the dispute resolution team, which issued its decision on April 8 finding that the Respondent violated the Agreement by requiring the Union to sign the Confidentiality Agreement before obtaining the requested information and ordered the Respondent to ". . . provide the union with all requested information and make the requested employees available for interviews as soon as reasonably possible." On the following day, the Respondent gave the Union the requested documents.

On February 6, the Respondent gave Stokes a notice of 14-day suspension (without loss of pay) because of the incident with Harrington. On March 16, the Union grieved this action and the dispute resolution team expunged and removed this discipline.

Thornton testified that he interviewed all the employees whom Harrington named as having knowledge of the incident. During these interviews he took notes of what the witness

said and at the conclusion of these interviews, he typed the statements and presented them to the witnesses for their signatures and/or corrections. The typed versions were completed on either February 10 or 11 and the information was offered to the Union, subject to signing the Confidentiality Agreement, on February 12. When he spoke to Cervizzi about her RFI, he told her that Harrington didn't want the information to get out and because of the "sensitive material" he wanted the Union to sign a Confidentiality Agreement prior to receiving the information, although he is unaware of any contractual language requiring the Union to sign such an agreement prior to receiving any requested information. He provided the Union with the requested information 1 day after the dispute resolution team issued its decision finding that the Respondent violated the Agreement by requiring the Union to execute the Confidentiality Agreement in order to receive the information.

## III. Analysis

Simply stated, the issue is whether the Respondent violated Section 8(a)(5) of the Act by refusing to turn over the admittedly relevant information to the Union until they executed the Confidentiality Agreement. Article 31 of the Agreement states:

> Section 3. Information
> The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information. Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or designee. All other requests for information shall be directed by the National President of the Union to the Vice President, Labor Relations.
>
> Article 32.2
> Nothing herein shall waive any rights the Union may have to obtain information under the National, Labor Relations Act, as amended.

In addition, the parties jointly prepared and executed a joint contract administration manual (JCAM) effective July 14. Its purpose was to ". . . explain how the contract should be applied based on national level grievance settlements, arbitration awards and agreements" and that it ". . . represents the definitive interpretation of the 2011-2016 National Agreement." The preface to the JCAM states: "It is not intended to, nor does it, increase or decrease the rights, responsibilities, or benefits of the parties under the Collective Bargaining Agreement. It neither adds to, nor modifies in any respect, the current Collective Bargaining Agreement." In interpreting article 31.3, the JCAM states:

> Article 31.3 provides that the Postal Service will make available to the union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of the Agreement, including information necessary to determine whether to file or continue the processing of a grievance. It also recognizes the union's legal right to employer information under the National Labor Relations Act. Examples of the types of information covered by this provision include: . . . disciplinary records.

Neither the Agreement, nor the JCAM, permits nor denies the Respondent the right to condition turning over information on the Union's execution of a Confidentiality Agreement,

although one can argue, as the General Counsel has, that by stating that the Respondent "will make available . . ." the information, the Agreement and the JCAM require the Respondent to provide the information unconditionally.

In *Detroit Edison Co. v. NLRB,* 440 U.S. 301 (1979), the union, to assist it in the pursuit of grievances, requested information concerning job aptitude test scores, alleging that the tests had been used unfairly in denying employee promotions. The employer offered to disclose the test scores only upon the consent of the examinees. The Board rejected the employer's claim that its need to keep these test scores confidential outweighed the union's need for the information and found that the employer violated the Act by refusing to furnish the information as requested. In refusing to the enforce the Board's Order, the Court was critical of the Board's failure to accord proper weight to the employer's need to keep the requested information confidential, stating: "[T]he strength of the company's concern [for confidentiality] has been abundantly demonstrated. The Board has cited no principle of a national labor policy to warrant a remedy that would unnecessarily disservice this interest and we are unable to find one." In balancing the interests, the Court ruled that the employer had a "well founded interest" in the confidentiality of the test scores while there would only be a "minimal burden" on the union in accepting the employer's offer.

In *Pennsylvania Power Co.,* 301 NLRB 1104 (1991), the employer, a public utility, became aware through informants that some employees were violating its drug and alcohol policy and had the employees drug tested; 10 tested positive and were discharged or suspended. The union grieved these disciplines and when it learned that the employer had obtained the information from informants, it requested the names of the informants and any statements that they gave in support of the information. The employer refused to provide this information asserting that it had promised them confidentiality. In agreeing with the employer, the Board stated:

> The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests.

The Board found that because the employer's ". . . workplace includes both nuclear and fossil power production plants as well as other inherently dangerous work settings," its confidentiality interests were entitled to unusually great weight, and that although the names and addresses of the informants were relevant to the union's collective-bargaining responsibilities, there was "a potential for harassment of informants, with a concomitant chilling effect on future informants," and therefore the employer's confidentiality argument outweighed the union's need for the information.

*Mobil Oil Corp.,* 303 NLRB 780 (1991), is similar to *Pennsylvania Power,* supra, as is the result. The Board found that the employer's interest in maintaining the confidentiality pledge it gave to the informants was entitled to "unusually great weight," in light of the potential for retaliation, as well as the prevention of an environmental disaster resulting from a pipeline accident caused by a drug-impaired employee, and that this interest outweighed the union's interest in obtaining the names of the informants.

In *Metropolitan Edison Co.,* 330 NLRB 107 (1999), two informants notified the employer that a certain employee was stealing food from the plant cafeteria; he was placed under surveillance and was discharged. The union grieved the discharge and requested the names of the informants, but the employer refused, citing confidentiality and fear of retaliation. In finding a violation, the Board stated:

> We agree with the judge that the identities of the informants were relevant and necessary for processing Eppinger's grievance. However, we do not agree with the judge that a confidentiality claim is not legitimate or substantial when it involves informants about workplace theft rather than drug use or other conduct impacting public or employee safety. Nevertheless, assuming that the Respondent has asserted a legitimate and substantial confidentiality interest here, we find that the confidentiality interest was not so substantial as to justify the Respondent's blanket refusal to provide any information in response to the request for informants' names. In the circumstance here, we find that the Respondent had an obligation to come forward with some offer to accommodate both its concerns and the union's legitimate needs for relevant information…Here, the Respondent made no effort to bargain to accommodate the union's interest in seeking relevant information. Instead, it flatly rejected the request for the informants' names. It therefore violated Section 8(a)(5).

In *National Steel Corp.,* 335 NLRB 747 (2001), through the use of a hidden camera in the plant, the employer caught an employee making telephone calls from a manager's office, and discharged him. The union grieved the discharge and requested the location of all the hidden cameras in the plant. Repeating the language of *Metropolitan Edison,* supra, the Board stated that an employer cannot simply assert confidentiality to avoid its obligation to provide the union with requested information: "Rather, the employer has the burden to seek an accommodation that will meet the needs of both parties."

Although he completed his investigation on about February 11,Thornton refused to give the Union the admittedly relevant requested information to the Union unless and until it signed the Confidentiality Agreement; when they refused to do so, he gave it to the Union on April 9, 1 day after the arbitration ruling that ordered him to turn it over. The issue therefore is whether he was justified in demanding the Union to execute the Confidentiality Agreement. I find that he was not. The cases cited above stand for the proposition that the employer has the burden of establishing the necessity of the need for the confidentiality agreement. However, the party claiming confidentiality, usually the employer, cannot simply make a blanket claim of confidentiality; when its claim is not so substantial as to justify its refusal to provide the information, it must seek an accommodation with the Union, and the nature of the workplace, and the information requested will determine how much weight should be given to the employer's claim. The Respondent has satisfied none of these requirements. Although sexual harassment claims are very serious, the nature of Harrington's claim and the statements that resulted cannot be compared with the danger inherent in the release of the information in *Pennsylvania Power Co.* and *Mobil Oil,* supra. In addition, Thornton demanded that before the Union would be given the statements, they had to execute the confidentiality agreement; he made no effort to seek an accommodation or a compromise with the Union. I therefore find that by demanding that the Union execute the Confidentiality Agreement before he would furnish the Union with the requested information, the Respondent violated Section 8(a)(5) and (1) of the Act.

## Conclusions of Law

1. The Board has jurisdiction over the Respondent pursuant to Section 1209 of the PRA.

2. The Union and NALC have each been labor organizations within the meaning of Section 2(5) of the Act.

3. By requiring that the Union to execute a Confidentiality Agreement in order to be given information which was relevant to it as the bargaining representative of certain of its employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

**The Remedy**

As the Respondent furnished the information to the Union pursuant to the April 8 decision of the dispute resolution team, no affirmative order is required other than posting the required notice to employees.

Upon the foregoing findings of fact, conclusions of law, and based upon the entire record, I issue the following recommended[2]

**ORDER**

The Respondent, United States Postal Service, Portland, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Requiring the Union to execute a Confidentiality Agreement in order to receive information that it requested that is relevant to it as the collective-bargaining representative of certain of the Respondent's employees in Portland, Maine.

(b) In any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at each of its facilities in Portland, Maine, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 2015.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**Dated, Washington, D.C. November 18, 2015**

**Joel P. Biblowitz**
**Administrative Law Judge**

**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the**
**National Labor Relations Board**
**An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

**WE WILL NOT** refuse to furnish National Association of Letter Carriers, Branch 92, a/w National Association of Letter Carriers (the Union) with information that is relevant to it as the collective-bargaining representative of certain of our employees in the Portland, Maine area, by insisting that the Union execute a Confidentiality Agreement in order to receive the information.

**WE WILL NOT** in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE HAVE** given the Union the information it requested in January 2015 concerning an investigation of a sexual harassment allegation.

**UNITED STATES POSTAL SERVICE**
**(Employer)**

**Dated_____ By_____**
**(Representative) (Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222–1072
Hours of Operation: 8:30 a.m. to 5 p.m.
617-565-6700.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-145800 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.